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Expert Opinions Regarding Feasible Alternative Designs and When They are Not Enough

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Plaintiff's expert just opined your client's product is unreasonably dangerous because a feasible alternative design exists that would have prevented the injury. With the benefit of 20/20 hindsight the expert testifies the product should have been wider, shorter, or longer. The list of alternative designs offered in litigation could fill the page and would no doubt grow more interesting as it goes. Not surprisingly an alternative design is not "feasible" simply because the plaintiff's expert says so. To be feasible the expert must do some work to demonstrate the proposed alternative does not impair the function of the product. Our courts do not allow free passes to plaintiff's experts simply because they are qualified. This article discusses cases that address expert opinions regarding alternative product designs under the Mississippi Product Liability Act ("MPLA").

A. Is the expert's design proposal feasible?

The MPLA defines a "feasible design alternative" as a "design that would have to a reasonable probability prevented the harm without impairing the utility, usefulness, practicality, or desirability of the product to users or consumers." MISS. CODE ANN. §11-1-63(f)(ii). Manufacturers spend countless hours and

substantial sums of money developing new product designs. The courts should hold plaintiffs' experts to a high standard and not allow them to talk off the cuff about how a product should have been designed. Fortunately, our courts have held that mere conceptual designs whose feasibility has not been demonstrated are not sufficient to establish a design defect claim. *Guy v. Crown Equipment Corporation*, 394 F.3d 320, 325 (5th Cir. 2004). If the alternative design exists only in the mind of the expert then it is only a concept.

In *Guy* the trial court excluded expert testimony that the forklift should have had a door on the operator compartment or a body restraint. *Id.* at 327. The plaintiff's expert proposed multiple designs but did not state which design he preferred. *Id.* at 326. The plaintiff's expert did not estimate the cost of any design, and he did not test any of the designs he proposed. *Id.* Plaintiff's expert only summarily stated that his conceptual designs would not impair the utility, usefulness, desirability, or practicality of the forklift. *Id.* The court concluded the expert merely presented conceptual suggestions instead of specifically formulated opinions. *Id.* at 327. The Fifth Circuit affirmed and noted that the expert never presented a specific design or a complete "end product." *Id.* "[C]onceptual suggestions about a

restraining device as a feasible design alternative did not rise to the level of an admissible expert opinion." *Id.*

The ruling in *Guy* was recently applied to exclude an expert's opinion in a case involving a peanut harvester. In *Elliot v. Amadas Industries, Inc.* the plaintiff was injured when the picking mechanism of a peanut harvester was inadvertently activated from the cab while the plaintiff was performing repair work in the picking chamber. *Elliot*, 796 F. Supp. 2d 796, 807-10 (S.D. Miss. 2011). The plaintiff's expert proposed a lock-out mechanism or an alarm with a delay-switch. *Id.* at 807. The lock-out would prevent the system from starting until it was manually overridden from the picking chamber. *Id.* The alarm and delay would warn that the system is about to start and allow anyone near the picking mechanism to move. *Id.* The problem with these designs was they existed only in the expert's mind. There was no technical basis for the proposed designs. *Id.* at 808. The expert did not cite to engineering or manufacturing standards; did not test the designs; had no design drawings; did not seek the advice of anyone with relevant experience; did not perform research or feasibility studies; and had not published peer reviewed articles related to these designs. *Id.* at 809-10. The expert had done nothing but conceptualize, and the design was inadmissible.

When a proposed design is only a concept, an important question to ask is whether design drawings have been made. In *Watkins v. Telesmith, Inc.*, the plaintiff's expert proposed an alternative design of simply adding a second wire rope to buttress the holding strength of the existing wire rope. *Watkins*, 121 F.3d 984,

992 (5th Cir. 1997). The court excluded the proposal because: (1) he did not offer his own detailed design drawings or (2) conduct any testing on the proposed design. *Id.* at 992. The Fifth Circuit then stated: “-the proper methodology for proposing alternative designs includes more than just conceptualizing possibilities.” *Id.*

Design drawings may be done with the aid of computer simulations. In *Hyundai Motor America v. Applewhite*, the plaintiff’s expert used a computer-aided design program to draw and demonstrate his alternative design of an automobile’s A-pillar. *Applewhite*, 53 So. 3d 749, 757 (Miss. 2011). The A-pillar of an automobile is the structural component on either side of the windshield that supports the roof. The defendant in *Applewhite* did not argue that the computer program was flawed but that a computer simulation fails to take a proposed design out of the realm of a conceptual design. *Id.* The Mississippi Supreme Court held:

[W]e are asked to hold that computer simulations alone are not sufficient to support expert testimony, which we decline to do. We are not prepared to say that an expert must physically build a model of his alternative design in order to demonstrate its efficacy. [Plaintiff’s expert’s] utilization of a computer program for that purpose goes to the weight and credibility of such evidence and not to its admissibility.

Applewhite, 53 So. 3d at 757. The *Applewhite* verdict was reversed on other grounds, but the guidance given in this opinion with regard to design drawings seems to indicate that reliable design drawings may be sufficient to remove the “concept” tag from an expert’s proposed design.

The most problematic alternative design evidence from a defense perspective is that other products incorporate the design the plaintiff’s expert proposes. It is difficult to argue the design is nothing but a concept when it is currently being used in other products. For example, in a case involving a house fire allegedly caused by a defective ventilation fan, the plaintiff’s expert testified that companies within the fan industry have utilized the proposed alternative design (thermal cyclical thermal protector) for years, and the court held the testimony was reliable to prove an alternative design. *Standard Fire Insurance Co. v. Broan Nutone LLC*, No. 2:07-cv-44-ks-MTP, 2008 WL 5560882, at *5 (S.D. Miss. July 1, 2008). Similarly in *Willis v. Kia Motors Corp.*, several of the proposed alternative designs offered by the plaintiff’s expert had been used in other vehicles. *Willis*, No. 2:07CV062-P-A, 2009 WL 1974563, at *4 -5 (N.D. Miss. July 29, 2009) (*see also Graves ex rel. W.A.G. v. Toyota Motor Corp.*, No. 2:09cv169KS-MTP, 2012 WL 32955, at *4 -5 (S.D. Miss. May 4, 2012) (plaintiff’s proposed alternative designs for a Toyota 4Runner were sufficient because those designs were incorporated into later model 4Runners and were used by other manufacturers). If the proposed alternative design has been incorporated in other products you should ask two questions: (1) are the products true comparables and (2) does the proposal cause problems with the product?

The plaintiff’s expert should not be allowed to criticize the design of your product by comparing it to a product that is not similar in function. The crashworthiness of all vehicles cannot be that of an armored tank. A sedan is wider and inherently more stable than a sports utility vehicle (“SUV”). Are all SUVs defective because they are generally not as stable as sedans? The answer should be

“no,” but courts addressing expert issues in the context of the MPLA have not yet addressed the degree of similarity required before an expert can use other products to support their opinions. If courts do not reign in experts who compare dissimilar products then performance-oriented products will be penalized because as a general rule, those product designs present greater inherent risk.

Another consideration is whether the proposed design change adds new risks to the product. Again the legal question is whether the proposal impairs the utility, usefulness, desirability, or practicality of the product. If there is evidence that the proposed alternative design impairs the product then evidence of that alternative should not be allowed. In *Wolf v. Stanley Works* the plaintiff’s expert proposed a mat system that was a first-generation automatic door system from the 1950’s. 757 So. 2d 316, 322 (Miss. App. 2000). The plaintiff’s expert witness conceded that the “mats had a short life expectancy, were likely to fail and result in accidents, and were very costly.” *Id.* The court held that the proposal impaired the utility, usefulness, practicality or desirability of the doors and granted summary judgment. *Id.*

When determining whether an expert’s proposed design is feasible our courts will not tolerate mere conceptual possibilities. The most important question to ask when analyzing the feasibility of an alternative design opinion is whether other products incorporate the design the expert proposes. If the answer is “Yes” then the relevant inquiries are: (1) are the products true comparables and (2) does the alternative design create problems with the other products. If the answer is “No” then the design may be only a concept. To determine whether the design is conceptual only one should inquire as to: design drawings; prototypes; testing

of the design alternative; simulations of the design alternative; feasibility studies of the design alternative; published peer reviewed articles regarding the design alternative; cost estimates of the alternative design; and does the alternative design propose additional risks.

B. Does the expert's design proposal fit your accident?

The MPLA requires that the plaintiff prove that any proposed alternative design would have, "to a reasonable probability prevented the harm." MISS. CODE ANN. §11-1-63(f)(ii). In many cases, the accident scenario is missing crucial details or the plaintiff's description is so far from reality that the plaintiff's accident reconstructionist will contradict the plaintiff's version of events. For instance, the driver of the vehicle may testify "I did not turn the vehicle just before the accident," but the plaintiff's expert may testify that the vehicle will not overturn without turning input. In such a case, the expert would be working from a hypothetical scenario, and his proposed alternative design should not be admissible. Thus, when the expert presents each alternative design you must ask: Would this alternative design have prevented the accident described by the plaintiff and other witnesses?

In *Townsend v. Doosan Infracore American Corporation* the claimed defect in the forklift was the lever that puts the forklift into gear "does not lock in neutral and can easily be bumped into engagement." *Townsend*, 3 So. 3d 150, 154 (Miss. 2009) (citing from the expert's report). The problem with this expert opinion was "there was no evidence presented to show that Townsend actually bumped the gear shift when he exited the vehicle." *Id.* In fact the plaintiff in *Townsend* testified, "I am unaware of me

doing that [hitting the gear shift lever]. I don't feel like I did." *Id.* at 155. Testing that re-created what the court termed the "hypothetical scenario" could not overcome Plaintiff's testimony that the accident did not happen as the expert suggested. *Id.* at 156.

C. Is there evidence that the design failed to function as expected?

The next inquiry when analyzing expert opinions regarding feasible alternative designs is whether the product failed to function as expected. Even if the expert's opinions about proposed designs are admissible, the case should not get to the jury if the product did exactly what one would expect. The MPLA states, "[t]he product failed to function as expected **and** there existed a feasible design alternative that would have to a reasonable probability prevented the harm." MISS. CODE ANN. §11-1-63(f)(ii) (emphasis added).

The Mississippi Court of Appeals dismissed a plaintiff's claim that a garage door was defectively designed because the garage door functioned as expected. *Glenn v. Overhead Door Corp.*, 935 So. 2d 1074 (Miss. App. 2006). The plaintiff in *Glenn* claimed that the garage door opener was defective because it lacked a carbon monoxide sensor and therefore permitted deadly fumes to collect in a closed garage. *Id.* at 1078. The Court of Appeals affirmed summary judgment for the manufacturer because the garage door opener functioned as the plaintiff expected. *Id.* at 1081. Another reason was the court's conclusion that "no reasonable person could expect that a garage door opener with no carbon monoxide detector would raise the door when the carbon monoxide reached a toxic level." *Id.* at 1082.

Similarly, in *Wansley v. Wansley*, the plaintiff was injured on a jet propelled

watercraft. *Wansley*, No. 251-98-1259CIV, 2002 WL 32091072, at *9 (Miss. Cir. Aug. 28, 2002). The steering mechanism on the watercraft required jet propulsion before the watercraft would turn. *Wansley*, 2002 WL 32091072 at *2. The plaintiff's expert's alternative design was a rudder that would turn the watercraft and not require any propulsion. *Wansley*, 2002 WL 32091072 at *4. Because the plaintiff knew the watercraft required propulsion to turn, the court found the product functioned as expected; evidence of a different feasible design did not preclude summary judgment. *Wansley*, 2002 WL 32091072 at *9.

The logic behind the failed-to-function-as-expected requirement is obvious - there is literally no product that could not be made safer, and consumers/users should decide when a product is sufficiently safe. If a garage door purchaser felt a garage door without a carbon monoxide detector is an unacceptable risk, then they should not purchase it. Therefore, you should always ask the plaintiff or other key witness if they knew of the danger presented by the product without the alternative design proposed by the plaintiff's expert.

D. Conclusion

Without question the plaintiff's expert's opinion on alternative design is the most important issue in an MPLA design defect lawsuit. When preparing the case evaluation, giving advice to your client, or deposing the expert you should ask three questions: Is the alternative design proposed merely a concept existing only in the mind of the expert? Would the alternative design have prevented *this* accident, or is the expert relying on his own hypothetical scenario? Should the consumer or user have expected the product to function the way it did? ■